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Supreme Court, U.S.
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No. 03 53

In the Supreme Court of the United States

TERRENCE WASHBURN, PATRICIA WASHBURN, PENELOPE NICOL, Individually and as Trustees of the 727 Realty Trust, THE 727 REALTY TRUST,

Petitioners,

vs.

JERRY SOPER, Individually, and as a partner of SOPER AND TYLER, THE SOPER LAW FIRM,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a federal court in a diversity case determine the applicable state law based upon the existing case law from the state's highest court, or does it attempt to determine how the state might rule in light of trends in the case law?

RULE 29.6 STATEMENT

All parties to the proceeding are listed in the caption of the case. There are no corporate parties.

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STATEMENT OF JURISDICTION

The Court of Appeals filed its order affirming the judgment of the District Court on February 11, 2003 (1a[1]). A timely petition for rehearing was denied on April 9, 2003 (24a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

735 ILCS 5/13-214. 4.3(b). An action for damages based on tort, contract or otherwise (i) against an attorney arising out of an act or omission in the performance of professional services or (ii) against a non-attorney employee arising out of an act or omission in the course of his or her employment by an attorney to assist the attorney in performing professional services must be commenced within 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought.

STATEMENT OF THE CASE

Basis for District Court Jurisdiction

All plaintiffs-petitioners are citizens of the State of Illinois. All defendants-respondents are citizens of the State of Iowa. The amount in controversy exceeded $75,000, exclusive of costs (25a). This case was filed in the United States District Court for the Southern District of Iowa pursuant to 28 U.S.C. § 1332.

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[1] Materials in the Appendix will be designated by their page in the Appendix followed by the letter "a". Documents cited from the record before the Court of Appeals will be designated "C".

Allegations in the Complaint

The plaintiffs-petitioners (hereinafter "petitioners") alleged that defendants-respondents (hereinafter "respondents") were their attorneys in an arbitration proceeding arising out of a dispute concerning a commercial real estate transaction. Petitioners alleged that respondent Soper, in the course of representing them in the arbitration proceeding, breached the standard of care by coercing them into accepting an unreasonably low settlement (26a).

Proceedings in the District Court

Respondents moved for summary judgment, arguing, *inter alia*, that the complaint was barred by the two-year statute of limitations for attorney- negligence found at 735 ILCS 5/13-214.3(b) (C.) Petitioners responded to that aspect of the motion for summary judgment by arguing that the district court should apply the Iowa statute of limitations for attorney negligence.

The district court granted the motion, holding that the Illinois statute applied, and that petitioners knew, or reasonably should have known, of their injury caused by respondent's acts or omissions more than two years before the filing of the complaint against respondents (14a-22a).

Proceedings in the Court of Appeals

Petitioners argued that summary judgment was inappropriate because the most recent decision of the Iowa Supreme Court on choice-of-law between statutes of limitations held that the statute of limitations is procedural, not substantive. Accordingly, an Iowa court would apply the Iowa statute of limitations so long as the Iowa statute barred only the remedy and not the right to sue.

Respondents argued that under the amended version of the Restatement (Second) of Conflict of Laws, §142, the statute of limitations is no longer considered procedural. Respondents argued that the court should consider which state has the more significant relationship to the parties and the occurrence to determine which of the two statutes of limitations to apply.

The United States Court of Appeals for the Eighth Circuit affirmed the judgment of the district court. The court began its analysis by citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), which holds that a district court in a diversity case must determine choice of law issues as would the highest court of the state in which it sits. The court stated that although the most recent pronouncement of the Iowa Supreme Court with respect to choice of law between statutes of limitations was based upon the "procedural vs. substantive/right vs. remedy" distinction, it determined that the Iowa Supreme Court typically follows the current version of the Restatement (Second) of Conflicts of Law in choice-of-law issues in other areas of law. Accordingly, by predicting that the court would follow the contemporary pronouncement of the Restatement, the court affirmed the district court's determination that Illinois bore the more significant relationship to the parties and the occurrence (1a-13a).

Applying the Illinois legal malpractice statute of limitations (735 ILCS 5/13-214.4.3(b)), the court held that there was no genuine issue of material fact concerning the issue of whether plaintiffs knew of their injury and its wrongful causation within two years of the injury. Accordingly, it affirmed summary judgment based upon the Illinois statute of limitations.

Petitioner's petition for rehearing was denied.

REASONS FOR GRANTING THE PETITION

THE EIGHTH CIRCUIT'S PREDICTION THAT THE IOWA SUPREME COURT WOULD FOLLOW THE RESTATEMENT INSTEAD OF ITS OWN MOST RECENT PRONOUNCEMENT ON CHOICE OF LAW IS INCONSISTENT WITH THE "ERIE" DOCTRINE.

This Court's decision in *Erie R. Co. v. Tompkins*, 304 U.S. 68 (1938), sets forth a fairly simple rule: a federal court sitting in diversity jurisdiction will apply the law of the state in which it sits. This includes both its statutory law and the common law of the state. What constitutes the common law of the state is typically determined by referring to the most recent decision of the highest court of the state in which the district court sits.

In the instant case, however, neither the district court nor the court of appeals relied upon the most recent Iowa Supreme Court case to answer the question of whether the Iowa or Illinois statute of limitations would determine if petitioner's action were timely filed in the District Court. Instead, both lower courts predicted that Iowa would apply a newer and different set of choice of law principles than those represented by the most recent pronouncement of the Iowa Supreme Court. The question posed by this petition, therefore, is as follows: is a federal court sitting in diversity supposed to predict changes in the law of the state in which it sits, or apply existing law?

This Court addressed that issue, albeit tangentially, in *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956). Justice Douglas' majority opinion held that the court of appeals should apply Vermont state law on remand. The opinion deemed Vermont law settled, with no indication that the court intended to overrule its precedents or that the legislature intended to abandon its longstanding policies (352 U.S. at 205). Justice Frankfurter's concurrence suggested that Vermont law was antiquated and

therefore open to review on remand by the court of appeals (*Id.* at 209-12).

One could argue that the *Bernhardt* majority established a precedent of following the existing law of the state unless the state itself had taken steps to change it. Even if this Court is not willing to go that far, what does not emerge from the debate between the majority and concurring opinions is a clear statement of the standards by which the lower federal courts should resolve this controversy. This essentially invites the lower federal courts to take their own predilections as the law of the state being "followed."

The lower court's decisions in this case, as well as the concurring opinion in *Bernhardt*, implicate the very concerns which underlay Justice Brandeis' opinion in *Erie*. Stemming from the ancient decision in *Swift v. Tyson*, 16 Pet. 1, 10 L.Ed. 865 (1842), Justice Brandeis feared that federal judges would implement a "federal common law," resulting in the potential for inconsistent outcomes between state and federal trial courts based upon the accident of diversity. 304 U.S. at 77-79.

This theme carried through to *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). Once again, this Court opined that if a federal court sitting in diversity applied the choice-of-law rules of its own selection, the parties stood to obtain a different outcome than if the parties were before a trial judge in state court. *See also, Day & Challoner, Inc. v. Zimmerman*, 423 U.S.3 (1975). ("a federal court in a diversity case is not free to engraft onto . . . state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits.") *Id.* at 4.

In the instant case, it is almost certain that had the case been brought in state court, the trial judge would

have applied the most recent decision of the Iowa Supreme Court, since Iowa follows ordinary principles of *stare decisis*. *Cover v. Creamer*, 137 N.W.2d 95 (1965). The most recent Iowa cases concerning choice-of-law in multistate statute of limitations cases hold that the statute of limitations is procedural. *Brooks v. Engel*, 207 N.W.2d 110 (Ia. 1973). Accordingly, Iowa will apply its own statute of limitations so long as it bars only the remedy, and not the right to sue. *Harris v. Clinton Corn Processing*, 360 N.W.2d 812 (1985).[2]

Nonetheless, the Eighth Circuit looked to other choice-of-law cases which had been before the Iowa Supreme Court in areas other than conflicting statutes of limitations. The Court correctly noted that the Iowa Supreme Court had followed the Restatement (Second) with respect to those areas of the law. *See Gabe's Const. Co. v. United Capital Ins. Co.*, 539 N.W.2d 144 (1995) (insurance cases); *Marriage of Whelchel*, 476 N.W.2d 104 (1991) (marital property division).

This petition for certiorari is neither the time nor the place to argue that although there are similarities between the conflict of law analyses concerning substantive areas of law and conflicting statutes of limitations, there are significant differences. The point petitioners seek to make is simpler: it is not for a federal court sitting in diversity to apply a different standard than would an inferior court of the state in which it sits.

The limitations upon the authority of lower federal courts to "update" the decisions of the state courts in

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[2] Because the Eighth Circuit did not apply the Iowa statute of limitations, there has never been a decision on the question of whether that statute bars the right or remedy involved in this case, or whether the underlying malpractice action was timely in light of the Iowa statute. Presumably, if this Court reverses, those issues will be addressed on remand.

which they sit has been addressed by at least two circuits. In *Tarr v. Manchester Ins. Corp.*, 544 F.2d 14 (1st Cir. 1976), the court stated "*Erie* calls upon us to apply state law, not, if we can be persuaded to doubt its soundness, to participate in an effort to change it (544 F.2d at 15)". In *St. Paul Fire & Marine Ins. Co. v. Jacobson*, 48 F.3d 778, 783, (4th Cir. 1995), the court held that *Erie* calls upon the court to apply state law as it exists, rather to suggest or surmise its expansion.

At the very least, accepting certiorari in this case could lead to the setting of a standard for a federal court considering going beyond the latest pronouncement of a state's highest court. If this Court favors, for want of a better term, a "state's rights" approach, it could hold that a federal court can do nothing more than apply the most recent decision of the highest court of the state in which it sits. On the other hand, if this Court chooses to be more deferential to the prognostication prowess of the lower federal courts, it can set a standard for going beyond the latest pronouncement of a state's highest court. Some examples might include "clear indication of an impending change" or "substantial evidence of a change."

However, there is no definitive current standard under which lower federal courts should determine when to depart from established state law in favor of a perceived trend in the law. The lack of certitude in the law leaves federal courts far too free to act as lawmaking (and difference-making) entities merely because the parties chose a federal forum. That is contrary to the spirit of *Erie*.

It has been 65 years since this Court decided *Erie*. In that span, this Court has struggled with choice of law issues arising out of diversity jurisdiction in several well-known contexts. *See, e.g., Guaranty Trust Co. v. York,* 326 U.S. 99 (1945); *Hanna v. Plumer*, 380 U.S. 460 (1965). However, beyond the internal debate in *Bernhardt*, this

Court has never dealt with the question of how to proceed when the lower federal court or courts think the highest court of the state whose law is being applied will not ultimately adhere to its latest pronouncement of the law of the state. The instant case, which involves settled law on one side and a trend in the law on the other, presents a perfect opportunity to clarify the standards by which lower federal courts can choose not to follow the most recent decision of a state's highest court.

CONCLUSION

For these reasons, Petitioners respectfully request that this Honorable Court grant their petition for a writ of certiorari, reverse the judgment of the United States Court of Appeals for the Eighth Circuit, and remand for further proceedings.

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

No. 02-1323

Terrence Washburn, Patricia Washburn, Penelope L. Nicol, Individually and as Trustees of The 727 Realty Trust; The 727 Realty Trust,	)	
Appellants,	)	
v.	)	Appeal from the United States District Court for the Southern District of Iowa.
Jerry Soper, Individually and as a Partner of Soper and Tyler,	)	
Defendant,	)	
The Soper Law Firm,	)	
Appellee.	)	

Submitted: December 13, 2002

Filed: February 11, 2003

Before WOLLMAN, HEANEY, and MAGILL, Circuit Judges.

WOLLMAN, Circuit Judge.

In this diversity action, the district court[1] granted summary judgment against the appellants (collectively, the Washburns), concluding that their malpractice claim was barred by Illinois' two-year statute of limitations. We affirm.

I. Background

In 1992, George and Janis Garlock purchased an eighty percent interest in the Kwik-Kleen Limited Trust, which owned the Kwik-Kleen Laundromat business. The remaining twenty percent interest was held by the 727 Realty Trust (727 Trust), which owned the laundry equipment and held title to the real property. Appellants Penelope Nicol and Patricia Washburn were joint trustees of the 727 Trust, and appellant Terrance Washburn was the beneficiary of this trust.

After the relationship between the Garlocks and the Washburns deteriorated, Nicol and Patricia Washburn sued the Garlocks in Illinois state court on behalf of the 727 Trust. The Garlocks filed a third-party complaint against Patricia Washburn and Nicol, as trustees of the 727 Trust, and against Terrence Washburn, individually and as a beneficiary of the 727 Trust. Glen Washburn also filed an action against the same three individuals, alleging that Nicol and Terrence Washburn had misrepresented, concealed, and failed to disclose material facts regarding the ownership of the real property held by the

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[1] The Honorable Charles R. Wolle, United States District Judge for the Southern District of Iowa.

727 Trust. This action was consolidated with the suit involving the Washburns and the Garlocks. All of the individuals involved in these suits were Illinois residents.

Jerry Soper represented the Washburns in the above-described proceedings. Soper, licensed to practice law in both Illinois and Iowa, maintained his office in Davenport, Iowa. On June 25, 1996, Soper participated in a hearing on the consolidated suits. During this hearing, the trial court encouraged the parties to settle, and Soper engaged in settlement discussions on behalf of his clients. By the next day, the parties' attorneys reached an agreement regarding all of the pending claims. According to the Washburns, Soper coerced them into agreeing to the terms of this settlement.

The Illinois trial court entered an order dismissing both cases pursuant to the settlement agreement. On January 10, 1997, the Washburns, through new counsel, moved to vacate this order. The Washburns' motion was denied, and their subsequent appeals were also unsuccessful.

On December 22, 1999, the Washburns brought a malpractice action against The Soper Law Firm (Firm) in the United State District Court for the Southern District of Iowa. The Firm moved for summary judgment, arguing that the Washburns' claim was barred by Illinois' two-year statute of limitations. The district court agreed and granted the Firm's motion.

II. Analysis

"We review de novo a grant of summary judgment, applying the same standard as the district court." *Forrest v. Kraft Foods, Inc.*, 285 F3d 688, 691 (8th Cir. 2002) (citation omitted). In this diversity case, we also review the district court's interpretation of state law de novo. *Walk v.*

Starkey Mach., Inc., 180 F.3d 937, 939 (8th Cir. 1999) (citing *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991); *Kaplon v. Howmedica, Inc.*, 83 F.3d 263, 266 (8th Cir. 1996)).

In granting the Firm's motion for summary judgment, the district court determined that (1) the Iowa Supreme Court would apply the revised version of Restatement (Second) of Conflict of Laws (Restatement) section 142 if presented with the issue; (2) in accordance with revised section 142, Illinois' two-year statute of limitations governs the Washburns' malpractice claim; and (3) this statute bars the Washburns' claim. On appeal, the Washburns contend that Iowa's conflict of law rules require us to apply Iowa's five-year statute of limitations to their claim, and that, even if Illinois' two-year statute of limitations governs, it does not bar their claim as a matter of law.

A. Applicable Choice of Law Rule

The Washburns first argue that the district court applied the wrong choice of law provision. In this diversity case, we apply Iowa's choice of law principles. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941). Iowa's rules generally "require ( ) the application of local law to matters of procedure." *Cameron v. Hardisty*, 407 N.W.2d 595, 596 (iowa 1987) (citing *Brooks v. Engel*, 207 N.W.2d 110, 113 (iowa 1973)). Iowa courts have historically viewed statutes of limitations as procedural, and therefore a local matter. *Harris v. Clinton Corn Processing Co.*, 360 N.W.2d 812, 814 (Iowa 1985). The Iowa Supreme Court recognized that this approach was consistent with the general rules set forth in Restatement section 142 (1971), which provided as follows:

> (1) An action will not be maintained if it is barred by the statute of limitations of the forum, including a provision borrowing the statute of limitations of another state.

> (2) An action will be maintained if it is not barred by the statute of limitations of the forum, even though it would be barred by the statute of limitations of another state, except as state in § 143.

Id. The Iowa Supreme Court also adopted the "exception" to the general rule of section 142(2), as found in section 143: "(A)n action will not be entertained in another state if it is barred in the state of the otherwise applicable law by a statute of limitations which bars the right and not merely the remedy." Restatement (Second) of Conflict of Laws (Restatement) § 143 (1971); *see Harris,* 360 N.W.2d at 816.

In 1988, sections 142 and 143 were revised and replaced with the following provision:

> Whether a claim will be maintained against the defense of the statute of limitations is determined under the principles stated in § 6. In general, unless the exceptional circumstances of the case make such a result unreasonable:
>
> . . .
>
> (2) The forum will apply its own statue of limitations permitting the claim unless: (a) maintenance of the claim would serve no substantial interest of the forum; and (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.

Restatement § 142 (1988). Iowa's appellate courts have not yet had the opportunity to consider this revision.

The Washburns contend that the district court erred in using the revised version of section 142 to determine the applicable statute of limitations. They assert that there was no need for the district court to "predict" what the Iowa Supreme Court would do, as that court has already addressed the issue. Referring us to the *Harris*

and *Cameron* cases, the Washburns contend that Iowa law requires application of the "right-remedy" analysis embodied in the pre-1988 version of sections 142 and 143. We disagree.

The Supreme Court has stated that "(w)hen (the highest court of a state) has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted." *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940) (citation omitted); *see Gillette Dairy, Inc. v. Mallard Mfg. Corp.*, 707 F.2d 351, 354 (8th Cir. 1983). As the Firm notes in its brief, the Iowa Supreme Court has repeatedly turned to the Restatement in analyzing choice of law issues. *See, e.g., Veasley v. CRST Int'l., Inc.*, 553 N.W.2d 896, 897 (Iowa 1996) (noting, in the context of a personal injury case, that "(w)e now follow the Restatement's 'most significant relationship' methodology for choice of law issues" (citations omitted)); *Gabe's Constr. Co., Inc. v. United Capitol Ins. Co.*, 539 N.W.2d 144, 146 (Iowa 1995) ("We determine choice-of-law issues in insurance policy cases by the intent of the parties or the most significant relationship test." (citation omitted)); *Cole v. State Auto. & Cas. Underwriters*, 296 N.W.2d 779, 781 (Iowa 1980) ("We think it is clear that choice-of-law questions (involving contract issues) are now to be determined under the Restatement (Second) test: intent of the parties or the most significant relationship."); *Cameron*, 407 N.W.2d at 597 ("Iowa has adopted the 'modern' choice of law rules (with respect to tort issues). . . ."); *see also Grove v. Principal Mut. Life Ins. Co.*, 14 F. Supp.2d 1101, 1106 (S.D. Iowa 1998) ("Iowa has adopted the Second Restatement of Conflicts as its choice-of-law provision." (citing *Cole*, 296 N.W.2d at 781)); *Harlan Feeders, Inc. v. Grand Labs., Inc.*, 881 F. Supp. 1400, 1405 (N.D. Iowa 1995) ("Iowa applies the 'most significant relationship test' to conflict-of-laws

or choice-of-law questions involving either contract or tort claims." (citations omitted)). The Iowa Supreme Court's commitment to the Restatement supplies the requisite "clear and persuasive indication" that it will modify its approach to conflicts involving statutes of limitations when presented with the issue. Accordingly, we conclude that the district court applied the correct choice of law rule.

B. Interest Analysis under Revised Section 142

Next, the Washburns contend that even if the district court was correct in concluding that the Iowa Supreme Court would adopt the revised version of section 142, the court erred in applying this provision. Under revised section 142(2), Iowa's longer limitations period will apply unless the following conditions exist: (1) maintenance of the claim would not serve any substantial interest of Iowa, (2) Illinois has a "more significant relationship to the parties and the occurrence," and (3) the Illinois statute of limitations would bar the claim. *See* Restatement § 142(2) (1988). The comments to revised section 142(2) indicate that, in accordance with the "emerging trend," a claim will not be maintained if it is barred by the statute of limitations of the state which, *with respect to the issue of limitations,* is the state of most significant relationship tothe occurrence and the parties under the principles stated in § 6." *Id.* cmt. e (1988) (emphasis supplied.)

After reviewing the principles outlined in section 6 of the Restatement, we conclude that the focal points of the choice-of-law inquiry should be the relevant polices of Iowa and Illinois, as well as the basic policies underly-

ing statutes of limitations. *See id.* §6(2)(b), (c), (e).[2] The purpose of such statutes is essentially two-fold: to protect both defendants and courts from stale claims. *See, e.g., K.E.S. v. United States,* 38 F.3d 1027, 1030 (8th Cir. 1994) (noting that the purpose of statutes of limitations is "to 'protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence,' while 'affording plaintiffs what the legislature deems a reasonable time to present their claims.'") (quoting *United States v. Kubrick,* 444 U.S. 111, 117 (1979)); *see also Lawyers Title Ins. Corp. v. Dearborn Title Corp.,* 118 F.3d 1157, 1166 (7th Cir. 1997) ("Statutes of limitations are ordinarily for the protection of defendants(,) . . . but they also protect the courts from the burden of adjudicating old claims." (citations omitted)). As Soper notes in his brief, the Firm is a "corporate resident" of Iowa. Thus, applying Iowa's longer limitations period would undermine its interest in protecting resident defendants. We recognize that Iowa has an interest in protecting those who retain Iowa attorneys from becoming the victims of professional negligence and in affording

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[2] Section 6 lists several factors that are relevant to the choice of law analysis;

> (a) the needs of the interstate and international
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue.
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

Restatement § 6(2) (1971).

parties "a reasonable time to present their claims." *K.E.S.*, 38 F.3d at 1030. Iowa also undoubtedly has an interest in maintaining the integrity of its bar. Nevertheless, we are not persuaded that these interests are "substantial" in circumstances such as this, where the plaintiffs are Illinois residents, the defendant attorney is licensed in both Iowa and Illinois, the defendant attorney was retained to represent the plaintiffs in Illinois state court proceedings, and these proceedings concerned Illinois residents, Illinois businesses, Illinois trust agreements, and Illinois contracts. In short, we agree with the Firm that Illinois has a "more significant relationship to the parties and the occurrence." Restatement § 142(2)(b) (1988).

C. Application of Illinois' Statute of Limitations

Finally, the Washburns contend that the district court erred in concluding that the Illinois statute of limitations barred their malpractice claim as a matter of law. Illinois has incorporated the "discovery rule" into its limitations provision for legal malpractice claims. Such claims must be brought within two years from the time when the plaintiff "knew or reasonably should have known of the injury for which damages are sought." 735 Ill. Comp. Stat. 5/13-214.3(b). Thus, "when a party knows or reasonably should know both that an injury has occurred and that it was wrongfully caused, the statute begins to run and the party is under obligation to inquire further to determine whether an actionable wrong was committed." *Hermitage Corp. v. Contractors Adjustment Co.*, 651 N.E.2d 1132, 1139 (Ill. 1995) (internal quotation marks and citations omitted). "The time at which a party has or should have the requisite knowledge under the discovery rule to maintain a cause of action is ordinarily a question of fact." *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 633 N.E.2d 627, 631 (Ill. 1994) (citation omitted). Summary judgment

is therefore appropriate "only if the undisputed facts allow for only one conclusion": that more than two years elapsed between the time when the Washburns knew or should have known of their injury, and December 22, 1999, when the Washburns filed their complaint. *Id.*

The district court found as a matter of law that "the latest date at which (the Washburns) knew or reasonably should have known of the actionable malpractice is the date they filed the motion to vacate the settlement agreement on the grounds of unconscionability." Although the district court was unable to determine the date of that filing, it noted that the hearing on the motion took place in November 1997. The court therefore concluded that because the complaint was filed more than two years after the hearing, the Washburns' claim was time-barred.[3]

In attempting to demonstrate that genuine issues of material fact remain as to the issue of when they knew or reasonably should have known of their injuries, the

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[3] The Washburns point "to an apparent misunderstanding by the district court judge regarding what (they) were alleging in their Motion to Vacate the settlement and dismissal and what they knew or were aware of regarding the wrongful nature of Soper's activities at the tiem they filed their Motion to Vacate." According to the Washburns, the coercion and duress alleged in their motion to vacate related to conduct by the state trial court judge, not Soper. Thus, the Washburns conclude, the district court's finding as to when they "knew or reasonably should have known of theactionable malpractice" is not supported by the record.

After review the record, we agree that the Washburns did not raise the issue of Soper's alleged misconduct in connection with their motion to vacate. We are not persuaded, however, that the district court's finding was based on a "misunderstanding," as earlier in its opinion, the court recognized that "the issue of Soper's alleged intimidation and coercive actions was not a material issue in the state court proceedings."

Washburns direct us to their deposition testimony. Both Terrence Washburn and Penelope Nicol were careful to maintain that although they felt that they had been coerced into settling, they did not realize that Soper's conduct constituted malpractice until they spoke with an attorney in March 1998. If the discovery rule were a purely subjective test, we might we agree that such testimony would preclude summary judgment. As discussed above, however, the relevant inquiry includes an objective component. Here, the record indicates that by the time they filed their motion to vacate, the Washburns believed that the terms of the settlement agreement were both "inequitable and unconscionable." (Motion to Vacate Dismissal ¶ 3.) By this point, the Washburns also believed that they had been coerced by Soper into settling. On these facts, the only reasonable inference that can be drawn is that a reasonable person, with such knowledge, would be on notice that he was injured and that the injury may have been wrongfully caused. *See Vector-Springfield Props., Ltd. v. Central Ill. Light Co., Inc.*, 108 F3d 806, 810 (7th Cir. 1997); *Hermitage Corp.*, 651 N.E.2d at 1139; *see also Belden v. Emmerman*, 560 N.E.2d 1180, 1182-83 (Ill. App. Ct. 1990) (concluding that where the defendants had allegedly entered into a settlement agreement over the plaintiffs' objection, the plaintiffs "had knowledge of damages" as of the day of the settlement conference, "(g)iven the nature of defendants's alleged activities and plaintiffs' knowledge of them at the time of the alleged breach").

The Washburns also suggest that the statute of limitations could not have started running until June 1999, when the Illinois Supreme Court denied their petition for leabe to appeal the Illinois Court of Appeals' decision regarding their motion to vacate. According to the Washburns, "they were (not) actually damaged by Soper's malpractice" until that time. This argument is

foreclosed by the Illinois Supreme Court's decision in *Hermitage Corp.* 651 N.E.2d at 1139 (recognizing that although the trial court could have reconsidered its adverse decision, the limitations period was triggered by this decision, as "(o)therwise, the statute of limitations could be postponed indefinitely until all avenues of appeal in the earlier suit were exhausted"). The Washburns also note that although "the incurring of additional attorney fees may trigger the running of the statute of limitations for legal malpractice purposes," this rule applies "only where it is clear, at the time the additional fees are incurred, that the fees are *directly attributable* to former counsel's neglect (such as through a ruling adverse to the client to that effect.)" *Lucey v. Law Office of Pretzel & Stouffer, Chartered,* 703 N.E.2d 473, 478 (Ill. App. Ct. 1998) (emphasis supplied). Here, the Washburns contend, "(their) payment of fees to a new attorney was not, as required, clearly 'attributable to former counsel's neglect.'" We are not persuaded. In their depositions, Terrence Washburn and Penelope Nicol indicated that they would not have signed the settlement agreement, but for Soper's coercive tactics. Thus, even though the Washburns did not include allegations of coercion by Soper in their motion to vacate the settlement agreement, we are satisfied that the fees they incurred in bringing this motion were "directly attributable" to Soper's alleged misconduct. *See id.*

For the reasons discussed above, we find that the Washburns failed to demonstrate the existence of any genuine factual issue as the when they "knew or reasonably should have known of the injury for which damages are sought." 735 Ill. Comp. Stat. 5/13-214.3(b); *see Hermitage Corp.*, 651 N.E.2d at 1138-39 ("When a plaintiff uses the discovery rule to delay commencement of the statute of limitations, the plaintiff has the burden of proving the date of discovery." (citations omitted)). We therefore

conclude that, in accordance with revised section 142(2) of the Restatement, Illinois' two-year statute of limitations bars the Washburns' malpractice claim as a matter of law.

The judgment is affirmed.

A true copy.
Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT COURT OF IOWA
DAVENPORT DIVISION

Terrence Washburn, Patricia Washburn, Penelope L. Nicol and the 727 Realty Trust	)	Civil Case No. 3-99-cv-80208
Plaintiffs,	)	
v.	)	Order
The Soper Law Firm, P.C.,	)	
Defendant.	)	

On Friday, November 2, 2001, the court held a hearing on defendants' resisted motion for summary judgment. The court's jurisdiction over this matter is based on 28 U.S.C. § 1332 (a) (2).

For the following reasons, the court grants defendant's motion for summary judgment and directs the clerk of court to enter judgment dismissing plaintiff's lawsuit at plaintiffs' costs.

I. BACKGROUND

This lawsuit arises out of a failed business partnership involving the ownership of a laundromat. In 1991, George and Janice Garlock (the Garlocks), not parties to this lawsuit, paid $88,000 for an eighty percent interest in the Kwik-Kleen Limited Trust (Kwik-Kleen Trust), which owned Kwik-Kleen Laundromat (the Laundromat). The Garlocks, as the new trustees of the Kwik-Kleen

Trust, leased the real estate on which the Laundromat stands from the owners, the plaintiff 727 Realty Trust. The Garlocks began operating the Laundromat in April 1992. Within two years, the Laundromat encountered economic hardship. Plaintiffs contend that the Garlocks stopped paying rent, allowed the property to fall into disrepair, and otherwise neglected their duties as trustees.

In September 1994, the plaintiffs filed a lawsuit to compel arbitration to recover the back rent owed by the Garlocks, in addition to monies to pay for the property damage that,plaintiffs allege, resulted from the Garlocks' neglect. In December 1994, Glen Washburn, also not a party in the present action, believed that his interest in the laundromat had been improperly emcumbered by Penelope Nicol and filed an action against plaintiffs. The Illinois state trial court consolidated these two matters. Jerry A. Soper agreed to represent plaintiffs in these two causes of action.

On June 25, 1996, the Illinois trial court held an evidentiary hearing to determine whether the disputes should be submitted to arbitration. During the hearing, Judge Joseph F. Beatty, the judge presiding over the issues, strongly encouraged the parties to settle the case. Plaintiffs allege that Soper did not permit his clients to address the judge at this time. The following morning, the plaintiffs contend, Soper presented to the plaintiffs the final proposals of the adverse parties. At that time, plaintiffs maintain, Soper told the plaintiffs that he would withdraw from their representation if they did not accept the settlement proposal. Plaintiffs assert that Soper's tone was abusive and threatening and that his conduct coerced the plaintiffs into accepting the terms of the settlement. Thereafter, the terms of the settlement were reduced to writing, which included a clause affirming that the agreement was a "free and voluntary act." Plaintiff Patricia Washburn, plaintiffs allege, crossed out this

term before having signed it. By December 11, 1996, plaintiffs had signed each of the settlement documents and all the matters were dismissed with prejudice.

In January 1997, plaintiffs, then represented by Joseph Spiezer, moved to vacate the dismissal of the case and to set aside the settlement on the grounds that it was unconscionable. There, plaintiffs argued that the settlement, to which they agreed before Judge Beatty, was unfair since the Garlocks had not revealed the extent of the damage tothe rented property. Judge Beatty denied this motion. Plaintiffs appealed. The Appellate Court affirmed the trial court and a subsequent petition for leave to appeal to the Supreme Court of Illinois was denied.

Plaintiffs argue that they did not realize Soper's representation amounted to actionable malpractice until attorney David Cunningham so advised them in March of 1998. This malpractice case followed.

II. DISCUSSION

A. Standard of Review

This court must grant summary judgment if, upon viewing the evidence in the light most favorable to the nonmoving party, the court determines that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. FED R. CIV. P. 56 (c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 332 (1986); *Lefler v. Gen. Casualty Co. of Wisc.,* 260 F.3d 942, 944 (8th Cir. 2001).

B. Collateral Attack

Defendant claims that this court lacks subject matter jurisdiction over the present matter. Defendant argues that, through this lawsuit, plaintiffs endeavor to attack the

validity of the judgments that the Illinois state courts entered concerning the financial matters of the Kwik-Kleen Trust. Generally, a party cannot collaterally attack a final a state court judgment through a cause of action brought in federal court. *Clark v. Clark,* 984 F.2d 272, 273 (8th Cir. 1993) ("Plaintiff may not relitigate (in federal court) the issues that have thus been determined against her, if she had a full and fair opportunity to litigate those issues in the state courts." (Citation omitted)). Once determined by the state court, an issue "must . . . be taken as conclusively established and accorded res judicata effect." *Ins. Co. of North America v. Bay,* 784 F.2d 869, 873 (8th Cir. 1986) (citing *Smith v. United States,* 369 F.2d 49, 53 (8th Cir. 1966), *cert. denied,* 386 U.S. 1010 (1967)). Stated differently, federal courts lack subject matter jurisdiction to "engage in appellate review" of matters that are inextricably intertwined with state court decisions. *Postma v. First Fed. Sav. & Loan of Sioux City,* 74 F.3d 160, 161 (8th Cir. 1996).

The court finds that plaintiff's malpractice action is not, as defendants argue, "inextricably intertwined" with the state court settlement agreement. In the present action, the plaintiffs do not ask the court to nullify their assent to the agreement, and therefore, to attack the judgments of the Illinois state courts. Instead, plaintiffs request that the court consider Soper's alleged coercion of his clients, the plaintiffs, to hold the defendant law firm accountable for plaintiffs' alleged monetary losses that resulted form Soper's malpractice. The defendant charges that Judge Beatty's ruling and the subsequent appeal affirming the decision held that the settlement agreements were not entered into under duress or coercion and were not unconscionable. After reviewing the transcripts of the initial June 25-26, 1996 evidentiary hearing as well as the January 11, 1997 hearing on the motion to vacate, this court finds that the Illinois state court issued

a ruling with respect to the unconscionability of the settlement. That court, however, did not consider the material fact of Soper's alleged coercion of the plaintiffs in making its determination. Therefore, this court takes judicial notice of the res judicata effect of the Illinois state court's ruling of the settlement agreement's fairness. Since the issue of Soper's alleged intimidation and coercive actions was not a material issue in the state court proceedings, the court finds that plaintiffs' action in tort against the defendant law firm is not barred as a collateral attack on the state court judgment.

C. Choice of Law

The United State Supreme Court made clear in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), that a federal court is to employ the substantive law of the forum in which it sits, *id.* at 69/78, including the choice of law principles. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *Birdsell v. Holiday Inns*, 852 F.2d 1078, 1079 (8th Cir. 1988); *Cameron v. Hardisty*, 407 N.W.2d 595, 596 (Iowa 1987).

The first question in this choice of law inquiry is to determine whether there is a "true conflict". *Nesladek v. Ford Motor Co.*, 46 F.3d 734, 736 (8th Cir. 1995). Here, plaintiffs contend that the applicable statute of limitations, IOWA CODE § 614.1(4) entitled "Unwritten Contracts—injuries to property—fraud—other actions, "allows for a five-year time period. The Iowa Supreme Court has held that the limitation set forth in § 614.1(4) applies to actions for attorney malpractice. *Venard v. Winter*, 524 N.W.2d 163, 164 (Iowa 1994). Defendant argues for the application of the Illinois statute, 735 ILL. COMP. STAT. 5/13-214.3, providing for a two-year limitation period. *Id.* Without question, a veritable conflict exists between Iowa

and Illinois law, and a choice of law determination is necessary.

Iowa courts look to Iowa in matters of procedure, irrespective of which state's substantive law ultimately applies. *Great River Coop. Of Southeastern Iowa v. Farmland Indus., Inc.*, 934 F. Supp. 302, 304 (S.D. Iowa 1996). With respect to choice of law rules, Iowa courts rely on Restatement principles. *Id.* at 305; *Harris v. Clinton Corn Processing Co.*, 360 N.W.2d 812, 814 (1985). Although as a general rule statutes of limitations are deemed procedural, not substantive for choice of law purposes, Iowa courts have recognized the following RESTATEMENT exception:

> In general, unless the exceptional circumstances of the case make such a result unreasonable:
>
> (1) The forum will apply its own statute of limitations barring the claim.
>
> (2) The forum will apply its own statute of imitations permitting the claim unless:
>
> (a) maintenance of the claim would serve no substantial interest of the forum;
>
> and
>
> (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (1988). Plaintiffs' claim would not be barred under Iowa's five-year limitations period. Even if the period were to begin running as of the date the parties signed the settlement agreements in the late 1996, the commencement of this action in late 1999 clearly predates the expiration of the limitation period.

a. Substantial interest lacking

The Iowa statute, therefore, applies unless this court's trial of the case would not serve any substantial interest in Iowa, and the claim would be barred under Illinois law. Although defendant Soper Law Firm is an Iowa professional corporation, no fact points to the State of Iowa having a substantial interest in the resolution of this dispute. First, although Soper is a licensed Iowa attorney, he is also licensed to practice law in Illinois. Second, the initial lawsuit concerned a business, trust agreements, and contracts established and performed under and pursuant to Illinois law. In addition, the Illinois Court of Appeals and Illinois Supreme Court affirmed Judge Beatty's judgment. Finally, the actions claimed to be malpractice took place in an Illinois state court proceeding. To entertain such a claim would be to "disserve (this) forum's general policy against the prosecution of stale claims" and "would frustrate the policy of (Illinois, which has) a substantial interest in the case and under whose statute of limitations the claim would be barred." *Id.* cmt.g.

Plaintiffs rely on two cases to support the proposition that the Iowa statute of limitation applies. Plaintiffs ask the court to disregard the holding of *Great Rivers* and, instead, base our holding on the rights/remedy doctrine of *Cameron* and *Harris*. *Cameron,* 407 N.W.2d at 596-97; *Harris,* 360 N.W.2d at 816. As mentioned earlier, as well as in the plaintiffs' brief, this court looks to Restatements for guidance in conflict of laws issues. *Great Rivers,* 934 F. Supp. At 305; *Harris,* 360 N.W.2d at 814. *Cameron* and *Harris* interpret Restatement sections 142 and 143 prior to their 1988 revision and consolidation into the above-quoted section 142. *Great Rivers,* 934 F. Supp. At 305. The *Great Rivers* court pointed out this discrepancy, and cast into doubt the viability of the previous reliance on outdated Restate-

ment sections. *Id.* The court agrees with the analysis of the revised section 142 and holding of *Great Rivers.* The court concludes that Iowa has no substantial interest in the resolution of the present matter in this forum.

b. Illinois statute bars claim

The inquiry does not end here. The court must also determine whether Illinois' statute of limitations would bar the claim. The Illinois Code of Civil Procedure prescribes:

> An action for damages based on tort, contract, or otherwise (i) against an attorney arising out of an act or omission in the performance of professional services . . . must be commenced within 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought.

735 Ill. Comp. Stat. 5/13-214.3 (b) (2001). Defendants argue that they were unaware that Soper's actions constituted actionable malpractice until attorney David Cunningham brought this to their attention in March 1998. The issue for the court to determine is whether, as a matter of law, plaintiffs knew or reasonably should have known of the alleged tortious conduct on the part of the defendant law firm. Under Illinois law, the time for which the court can charge a party with knowledge is generally a question of fact that the court should rule upon only if the undisputed facts permit but one conclusion. *Romano v. Morrisroe,* N.E.2, 2001 WL 1486729 (Ill. App. 2d Dist. Nov. 16, 2001). On this record, the court finds that there is a window of time during which plaintiffs knew or reasonably should have known of the defendant's alleged malpractice. On the undisputed facts, this period begins on June 26, 1966, the date on

which the alleged coercion occurred. The court finds as a matter of law that the latest date at which plaintiffs knew or reasonably should have known of the actionable malpractice is the date they filed the motion to vacate the settlement agreement on the grounds of unconscionability. Although this court is not aware of the date of that filing, the hearing itself took place on November 11, 1997. At that hearing, plaintiffs attorney, Joseph Spiezer, argued that plaintiffs had not voluntarily entered into the settlement agreement and that the agreement was unconscionable.

The court is satisfied that plaintiffs' allegations in the state court proceedings constitute knowledge for the purposes of the limitations on malpractice claims. The complaint was filed with this court on December 22, 1999—more than two years after the hearing on the motion to vacate. The court concludes that under Illinois law the plaintiffs' claim is time-barred.

III. CONCLUSION

The court grants defendant's motion for summary judgment.

IT IS SO ORDERED.
Dated this 28th day of December, 2001

/s/ Charles R. Wolle
Charles R. Wolle, Judge
U.S. District Court

UNITED STATES DISTRICT SOUTHERN DISTRICT
OF IOWA, DAVENPORT DIVISION

JUDGMENT IN A CIVIL CASE

Terrence Washburn, Patricia Washburn, Penelope L. Nicol, And the 727 Realty Trust,	)	
Plaintiffs,	)	
v.	)	Case Number: 3-99-80208
The Soper Law Firm, P.C.,	)	
Defendant.	)	

XX Decision by Court. This action came to consideration before the Court. The issue have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: that Defendant Soper Law Firm's Motion for Summary Judgment is granted. The Court is satisfied that Plaintiff's allegations in the State Court proceedings constitute knowledge for the purposes of the limitations on malpractice claims. The complaint was filed with this Court on December 22, 1999—more than two years after the hearing on the Motion to Vacate. The Court concludes that under Illinois law the Plaintiff's claim is time-barred.

December 31, 2001
Date

JAMES R. ROSENBAUM
Clerk

/s/
(By) Deputy Clerk

UNITED STATE COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-1323

Terrance Washburn, et al.,	)	
	)	
Appellants,	)	
	)	Appeal from the United
v.	)	States District Court
	)	for the Southern
	)	District of Iowa
The Soper Law Firm,	)	
	)	
Appellee.	)	

The petition for rehearing by the panel filed by the appellants is denied.

(5193-010199)

April 9, 2003

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

Terrence Washburn, Patricia Washburn Penelope L. Nicol, Individually and As Trustees of the 727 Realty Trust, and the 727 Realty Trust,	)	
Plaintiffs,	)	
v.	)	No. 3-99-cv-80208
The Soper Law Firm, P.C.,	)	
Defendant.	)	

SECOND AMENDED COMPLAINT

Terrence Washburn, Patricia Washburn and Penelope L. Nicol, individually and as Trustees of The 727 Realty Trust, and The 727 Realty Trust, Plaintiffs, complaining of Defendant, The Soper Law Firm, P.C. (formerly known as "Soper & Tyler, P.C."), state as follows:

1. The Plaintiffs each are citizens of the State of Illinois.

2. The Defendant is a corporation formed and existing under the laws of the State of Iowa, having a principal place of business in the State of Iowa. It is thus a citizen of the State of Iowa. The Defendant does business as a law firm. It is operated by Jerry A. Soper, an attorney at law.

3. The matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs. This court

accordingly has jurisdiction of the subject matter of the action pursuant to 28 U.S.C. § 1332(a) (1).

4. The Plaintiffs, and each of them, retained the Defendant law firm, which was then known as "Soper & Tyler, P.C.," to represent them in connection with a certain dispute involving claims the plaintiffs had against George and Janis Garlock and Glen Washburn.

5. As a result of the attorney-client relationship created between Plaintiffs and Defendant, the Defendant undertook a fiduciary duty to each of the Plaintiffs, as well as a duty to represent the Plaintiffs with the reasonable care, skill and diligence possessed and exercised by other attorneys in the community in similar circumstances.

6. Jerry A. Soper as the agent of the Defendant law firm was guilty of one or more of the following acts or omissions, in the representation of the Plaintiffs:

a. He failed to inform the Plaintiffs adequately as to their rights and obligations under the law.

b. He failed to allow the Plaintiffs to determine whether or not to settle their claims, but instead insisted that they settle their cause of action.

c. He agreed to a fee of $3000 for the Defendant firm's services, but then demanded a sum in excess of $17,000, which the Plaintiffs were coerced into paying.

d. He failed to complete the trial for which the Defendant law firm was retained and paid to complete, but instead coerced the Plaintiffs into a settlement which was not in their best interests.

These failures breached the Defendant's fiduciary duty to the Plaintiffs and the duty to exercise reasonable care,

skill and diligence on Plaintiffs' behalf, and constituted negligence.

7. As the direct and proximate result of the Defendant's wrongful acts and omissions described above, the Plaintiffs lost substantial rights against the Garlocks and other valuable rights; were forced to expend large sums of money they would not otherwise have been obligated to pay; and have been unable to receive substantial sums of money to which they should have been entitled.

8. The Plaintiffs were thus damaged, and continue to be damaged, by the Defendant's wrongdoing, in an amount now in excess of $413,000 and continuing to mount.

COUNT II

9. The Plaintiffs were thus damaged, and continue to be as if fully set forth herein.

10. An express contract existed between the Plaintiffs, as Defendant's clients, and the Defendant law firm, as their attorney.

11. As a material, implied term of the agreement between the Plaintiffs and the Defendant, the Defendant undertook a duty to represent the Plaintiffs with the reasonable care, skill and diligence possessed and exercised by other attorneys in the community in similar circumstances.

12. The Plaintiffs performed all terms, conditions and obligations on their part to be performed under this agreement.

13. The Defendant without justification or excuse breached the contract with the Plaintiffs, by failing to represent the Plaintiffs with the skill, knowledge

and diligence ordinarily exercised by other attorneys in this community in similar circumstances; and by the acts and omissions described above.

14. The Plaintiffs were damaged by the Defendant's breach of contract, in that the Plaintiffs lost substantial rights against the Garlocks and other valuable rights; were forced to expend large sums of money they would not otherwise have been obligated to pay; and have been unable to receive substantial sums of money to which they should have been entitled.

15. The Plaintiffs were further damaged by the Defendant's breach of contract in that they paid fees for services that were not of the level of skill and diligence ordinarily possessed and exercised by other attorneys in this community in similar circumstances, and which did not benefit them.

16. The Plaintiffs were thus damaged, and continue to be damaged, by the Defendant's wrongdoing, in an amount now in excess of $413,000 and continuing to mount.

WHEREFORE, Plaintiffs Terrence Washburn, Patricia Washburn and Penelope L. Nicol, individually and as Trustees of The 727 Realty Trust, and The 727 Realty Trust, respectfully pray that this Court enter judgment in their favor and against the Defendant, The Soper Law Firm, P.C., and grant them following relief:

(a) The forfeiture of any fees paid to the Defendant law firm by the Plaintiffs;

(b) An award of compensatory damages in an amount not less than $413,000, plus the costs of this action;

(c) An award of punitive damages in an amount appropriate to deter the Defendant and others from similar conduct;

and

(d) Such other and further relief as this Court deems equitable and just.

Plaintiffs demand trial by jury.

Respectfully submitted,

TERRENCE WASHBURN, individually and as successor trustee, PENELOPE NICOL, individually and as trustee, PATRICIA WASHBURN, individually and as trustee, and THE 727 REALTY TRUST, Plaintiffs,

By: _____
One of their attorneys

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